STATE OF MICHIGAN

COURT OF APPEALS

WHITMORE LAKE 23/LLC,[1] ZAKHOUR I. YOUSSEF, ANDOULLA YOUSSEF, MUAIAD SHIHADEH, and AIDA SHIHADEH,

Plaintiffs-Appellants,

and

ELIE R. KHOURY and FARIDEH KHOURY,[2]

Plaintiffs,

v

ANN ARBOR CHARTER TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED
April 28, 2011

No. 294696
Washtenaw Circuit Court
LC No. 06-000513-CZ

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's September 29, 2009 order granting defendant's motion to dismiss at the close of plaintiffs' proofs at trial on plaintiffs' claim that defendant's zoning ordinance as applied to plaintiffs' property violated plaintiffs' constitutional rights to substantive due process and equal protection. On appeal plaintiffs only assert the trial court erred regarding its substantive due process claim. We affirm.

Plaintiffs also assert the trial court erred in its December 4, 2007, "Order Granting In Part and Denying In Part Defendant's Motion for Summary Disposition and Dismissing Plaintiff's Claim of Appeal." This order denied defendant's motion for summary disposition and affirmed

[1] Whitmore Lake 23/LLC no longer has an interest in this litigation because its option to purchase the property expired during the proceedings below.

[2] Plaintiffs Elie Khoury and Farideh Khoury are part owners of the property in issue but are not listed as appellants because they were not included the claim of appeal. See MCR 7.204(D)(1).

the decision of defendant's zoning board of appeals (ZBA), denying plaintiffs' application for several variances. The ZBA ruled it did not have the authority to grant plaintiffs' requested variances to develop single-family residences on ½-acre lots because the request was for a use variance rather than a nonuse or dimensional variance. We conclude plaintiffs' appeal of the circuit court's decision affirming the ZBA decision is by leave, not by right. MCR 7.203(A)(1)(a); MCR 7.203(B)(1) or (4). Plaintiffs did not file an application for leave to appeal within 12 months of the entry of the December 4, 2007 order. MCR 7.205(F)(3). Consequently, this Court must dismiss this part of plaintiffs' appeal for lack of jurisdiction. See *Chen v Wayne State Univ*, 284 Mich App 172, 193, 199; 771 NW2d 820 (2009).

I. FACTUAL BACKGROUND

The six individual plaintiffs purchased the subject 166 acres of land in the township comprised of two adjacent parcels in 1981. The northern parcel, 110 acres, is zoned A-1 (general agriculture), which permits among other uses single-family residences on lots of at least 10 acres. Defendant's zoning ordinance describes the intended purposes of this district as follows:

> *General agriculture district (A-1).* This district is intended to protect and preserve areas of prime agricultural soils for continued agricultural uses. The district is intended to be located in the areas of the Township that are designated in the general development plan for agricultural use. The regulations in this district are the minimum necessary to protect the open, rural character of the agricultural area from intrusion of urban and suburban uses, that is in turn necessary to permit continuation of agricultural operations. Rural residences are considered compatible with the intent of this district if developed at the low density provided in this district and in such a manner that they will not interfere with agricultural operations. [Compiled Ordinances 1990, § 130.1002(A)(2); see also current § 74-427(a)(2).]

The southern 56-acre parcel is zoned R-2, which permits among other uses single-family residences on lots of at least one-acre. Defendant's zoning ordinance describes the intended purposes of this district as follows:

> *Single-family suburban residential district (R-2).* This district is intended to provide areas for single-family, non-farm residences on lots of sufficient size to permit the use of on-site water supply and wastewater treatment systems. The district is intended to be applied to areas designated in the general development plan for suburban residential use at a density of 0.5 to 1 DU/acre. This district is intended to be used in the parts of the areas described in [rural/agricultural and rural/residential] that do not have natural features that would be endangered by development at the density permitted in this district. [Compiled Ordinances 1990, § 130.1002(A)(2); see also current § 74-427(a)(2).]

In 2002, plaintiffs entered an agreement with Whitmore Lake/23 LLC granting it an option to purchase the subject property. The option was amended several times, finally expiring during the proceedings below. Plaintiffs and Whitmore Lake desired to develop the subject

property by building single-family residences situated on ½ acre lots. In 2005, Whitmore Lake filed an application with the township's planning commission seeking to rezone the property from A-1 and R-2 to R-3A, which would permit among other uses single-family residences on ½-acre lots. On September 6, 2005, the planning commission adopted a resolution recommending that the township board deny the rezoning application. On November 21, 2005, defendant's board of trustees adopted a resolution denying plaintiffs' application for rezoning.

Plaintiffs thereafter submitted to defendant's ZBA an application for variances of lot size and other requirements in A-1 and R-2 districts so as to permit the development single-family residences on ½-acre lots in accordance with the original rezoning request that was denied by the township board. Although plaintiffs contended the variances they were requesting were "dimensional," on April 19, 2006, the ZBA denied the request on the basis that the ZBA lacked authority to grant use variances. The defendant's ordinance provides with respect to variances:

> The Board of Appeals shall have no authority to hear or make any determination on a request for a change in the use of any property in the Township otherwise prohibited by this chapter (sometimes referred to as a "use variance"), and any such change in the use of property shall be only by legislative act of the Township Board as provided in this chapter. All references to variances in section 24.11 of this article [now 74-266] shall mean dimensional variances as described in 24.04.2 [now 74-259(a)(2)][3] and not use variances. [Compiled Ordinances 1990, § 130.2404; see also current § 74-259(d).]

Plaintiffs filed this action on May 9, 2006, asserting five claims: Count I—violation of substantive due process; Count II—exclusionary zoning; Count III—denial of equal protection; Count IV—inverse condemnation; and Count V—an appeal of the ZBA's denial of plaintiffs' request for variances. On December 4, 2007, the trial court entered an order granting in part and denying in part defendant's motion for summary disposition. Plaintiffs' counts II and IV were dismissed with prejudice by stipulation of the parties. The trial court denied defendant's motion as to counts I and III. This order also affirmed the ZBA decision regarding plaintiffs' variance requests and "dismissed with prejudice" count V of plaintiffs' complaint.

The hearing on plaintiffs' appeal of the ZBA decision was held on April 13, 2007, but no order was entered until December 4, 2007. Instead, the case proceeded through discovery. Defendant's motion for summary disposition was heard and denied on November 14, 2007. Thereafter, the case proceeded to trial on March 14, 2008, May 23, 2008, and August 1, 2008 with the trial court receiving testimony and other evidence, including certain depositions the parties had taken. At the conclusion of plaintiffs' proofs, defendant moved for dismissal. By opinion and order dated September 28, 2009, the trial court granted defendant's motion and dismissed plaintiffs' remaining claims that defendant's zoning ordinance violated plaintiffs' substantive due process and equal protection rights. The trial court ruled that defendant's zoning

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[3] This subsection states: "Dimensional variances pertaining to area, placement, height, setback or similar matters."

scheme was rationally related to legitimate government interests, and that plaintiffs' evidence had not overcome the presumption the ordinance was constitutional. Plaintiffs appeal.

II. APPEAL OF CIRCUIT COURT ZBA RULING

The decision of the circuit court on a ZBA appeal is not a final judgment appealable by right to this Court. MCR 7.203(A)(1)(a) provides for an appeal of right: "The court has jurisdiction of an appeal of right filed by an aggrieved party from the following: (1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court (a) on appeal from any other court or tribunal." The circuit court's decision also does not fall within the definition of "final judgment" under MCR 7.202(6)(a)(iii)-(v). Therefore, the circuit court's appellate decision regarding a ZBA ruling is by application for leave pursuant to MCR 2.203(B)(1), which provides for an appeal by leave of "a judgment or order of the circuit court, court of claims, and recorder's court which is not a final judgment appealable of right." See *Risko v Grand Haven Charter Twp*, 284 Mich App 453, 454; 773 NW2d 730 (2009); and *Hughes v Almena Twp*, 284 Mich App 50, 53; 771 NW2d 453 (2009).

In this case, the circuit court's decision on the ZBA appeal was entered on December 4, 2007. An application for leave to appeal was not timely filed within 21 days, MCR 7.205(A), or within 12 months on delayed application for leave, MCR 7.205(F)(3)(b). This Court has held that the failure to timely apply for leave to appeal as provided by the court rules deprives this Court of jurisdiction to hear the appeal. *Chen*, 284 Mich App at 193. In *Chen*, the plaintiff comingled claims within the jurisdiction of the Court of Claims with other claims within the jurisdiction of the circuit court. The parts of the plaintiff's complaint within the jurisdiction of the Court of Claims were dismissed about one year before the plaintiff's circuit court claims were likewise dismissed. *Id*. at 189. After entry of the last order, the plaintiff filed an untimely claim of appeal and he was required to apply for leave to appeal as to both orders, which were assigned separate docket numbers in this Court. *Id*. at 190.

The plaintiff argued that the two parts of his consolidated claims must be treated as a single case for purposes of appeal. According to this argument, the last order resolving the circuit court issues was the "final judgment" or "final order" under MCR 7.202(6). This Court rejected the plaintiff's argument, reasoning that the rule "defines the final judgment or order for a 'civil case' . . . [meaning] the final judgment or order in a *single* case. Consequently, MCR 7.202(6)(a) cannot be understood to require that consolidated cases be treated as a single case for purposes of determining the timeliness of appeals." *Chen*, 284 Mich App at 194. The Court went on to review the court rules and case law regarding joinder and consolidation, as well as discussion in Longhofer, Michigan Court Rules Practice (5th ed). The Court observed that two situations may arise: one where multiple claims are merged into a single case and one where claims are consolidated for reasons of efficiency of administration. *Chen*, 284 Mich App at 195-199. In the latter situation, "consolidation is a matter of convenience and economy in administration and does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Id*. at 197 (citations and internal quotations omitted). The Court concluded consolidation of the circuit court claims and Court of Claims action under MCL 600.6421 was for the sake of convenience and efficiency, and therefore, the two actions retained their separate identities. *Chen*, 284 Mich App at 198-199.

As a result, the *Chen* Court held, "[b]ecause the cases retained their separate identities, the time for appeal must be determined by reference to the final judgment or order for the individual cases." *Id*. at 199. Since the plaintiff did not file its application for leave to appeal regarding the order dismissing the Court of Claims action, "it was untimely and this Court did not have the discretion to grant leave to appeal." *Id*. Indeed, the Court held that the plaintiff's appeal must be dismissed "for lack of jurisdiction." *Id*.

In the present case, plaintiffs filed a complaint on May 9, 2006, asserting five counts, one of which was an appeal of the ZBA's denial of plaintiffs' request for variances. After defendant filed an answer to the complaint and affirmative defenses, plaintiffs filed, on July 11, 2006, a separate "claim of appeal" regarding the ZBA's decision to deny plaintiffs' requested variances. The ZBA appeal proceeded through the filing of the ZBA record, briefing, and oral argument on April 13, 2007 when the trial court rendered its decision on the record to dismiss the appeal. No order was entered at that time and discovery on plaintiffs' circuit court claims continued leading to defendant's motion for summary disposition, which the trial court heard and denied on November 14, 2007. Thereafter, on December 4, 2007, the trial court entered its order denying defendant's motion for summary disposition as to plaintiffs' claims regarding substantive due process and equal protection, dismissing by stipulation of the parties two other counts of plaintiffs' complaint, and denying plaintiffs' claim of appeal by affirming the decision of the ZBA. This order was titled: "Order Granting In Part and Denying In Part Defendant's Motion for Summary Disposition and Dismissing Plaintiff's Claim of Appeal."

No formal action appears in the record to either consolidate or sever plaintiffs' circuit court claims from the appeal of the administrative decision of the ZBA. It is clear, however, that the ZBA appeal and plaintiffs other circuit court claims proceeded, as they must, on separate tracks. See e.g., *Houdini Properties, LLC v Romulus*, 480 Mich 1022; 743 NW2d 198 (2008). The ZBA appeal was on the record to determine whether the administrative decision (a) complied with the constitution and laws of the state, (b) was based upon proper procedure, (c) was supported by competent, material, and substantial evidence on the record, and (d) represented the reasonable exercise of discretion granted by law to the ZBA. MCL 125.3606(1). Plaintiffs' circuit court claims proceeded though discovery, motions, and ultimately trial at which plaintiffs bore the burden of proof, resulting in the trial court's September 29, 2009 opinion and order dismissing plaintiffs' constitutional claims. The circuit through the same circuit court docket number processed the ZBA appeal and plaintiffs' circuit court claims. This informal consolidation appears to have been a "matter of convenience and economy in administration." The ZBA appeal and the circuit court constitutional claims retained their separate identities, legal standards, and the resolution of one would not affect the other. Consequently, for the reasons discussed already, plaintiffs appeal in this Court of the circuit court order affirming the ZBA decision is by application for leave to appeal, and must be timely as determined by the date of entry of the order on December 4, 2007. Plaintiffs did not timely file an application for leave to appeal within 12 months of the entry of the order. MCR 7.205(F)(3). Therefore, this Court must dismiss plaintiffs' ZBA appeal for lack of jurisdiction. *Chen*, 284 Mich App at 199.

III. PLAINTIFFS' CONSTITUTIONAL CLAIMS

MCR 2.504(B)(2) provides that at the close of the plaintiff's proofs at trial, the defendant may "move for dismissal on the ground that on the facts and the law the plaintiff has shown no

right to relief. The court may then determine the facts and render judgment against the plaintiff," and if it does, "the court shall make findings as provided in MCR 2.517." On appeal, any legal rulings of the trial court are reviewed de novo while the trial court's findings of fact are reviewed for clear error. *Samuel D Begola Services, Inc v Wild Brothers*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Thus, this Court reviews de novo the trial court's ultimate ruling regarding plaintiffs' constitutional challenge to defendant's zoning ordinance. *Kyser v Kasson Twp*, 486 Mich 514, 519; 786 NW2d 543 (2010).

Plaintiffs argue that the trial court erred by dismissing their substantive due process claim because the evidence indicated defendant's zoning classification was driven by an impermissible desire to preserve the aesthetic benefits of rural living. Plaintiffs also contend that agricultural activities lack material economic value in the township and that permitting 10-acre lots for residential use does not preserve farming. Citing *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 533; 537 NW2d 610 (1995), plaintiffs further contend that the 10-acre minimum lot size, as applied to plaintiffs' northern parcel is arbitrary and capricious; consequently, it is unreasonable. As for defendant's concerns regarding infrastructure, plaintiffs assert that any increased demand for public services that would accompany development would be paid for by the increased tax base. Thus, plaintiffs argue, this Court should reverse the trial court and find that the zoning of plaintiffs' property violates plaintiffs' substantive due process rights.

Defendant argues that the zoning ordinance is presumed valid, and plaintiffs bear the burden of proving that it is an arbitrary and unreasonable restriction. Further, our Supreme Court has held that zoning will withstand constitutional challenge "if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Muskegon Area Rental Ass'n v Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001). Here, defendant argues, the trial court correctly ruled that plaintiffs failed to sustain their high burden of proof in challenging the constitutionality of defendant's ordinance.

This Court has often identified preserving the identity or character of an area as a legitimate governmental interest that may be advanced by a municipality in its zoning ordinance. See *Dorman v Clinton Twp*, 269 Mich App 638, 651-652; 714 NW2d 350 (2006). Additionally, this Court has recognized that preserving the agricultural or rural character of an area furthers legitimate governmental interests, *Scots Ventures*, 212 Mich App at 533, as are avoiding overcrowding and preserving open space, and that density restrictions advance these goals, *Conlin v Scio Twp*, 262 Mich App 379, 383; 686 NW2d 16 (2004). Defendant's zoning ordinance also advances legitimate governmental interests in maintaining compatibility of surrounding areas, protecting and preserving natural resources, and ensuring adequate infrastructure such as roads, water supply, and sewage disposal systems. See *Frericks v Highland Twp*, 228 Mich App 575, 608-609; 579 NW2d 441 (1998). Also, contrary to plaintiffs' argument, improving and protecting the aesthetics of an area may legitimately be advanced by the government through zoning. See *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 572; 398 NW2d 393 (1986), and *Norman Corp v City of East Tawas*, 263 Mich App 194, 200-201; 687 NW2d 861 (2004).

Finally, defendant argues, the trial evidence fully supported the trial court's findings that at best plaintiffs established only that the reasonableness of the zoning of plaintiffs' property is debatable. Plaintiffs' own expert, David Call, made numerous admissions demonstrating

plaintiffs' inability to overcome the presumption that the zoning of the property is constitutional. For example, Call acknowledged that defendant's zoning rationally advanced several legitimate state interests, and, in particular, that controlling overcrowding is rationally advanced by requiring large lot sizes. Call also admitted that that protecting agricultural land and land use is a legitimate governmental interest and defendant's zoning classification serves that interest. With respect to the conclusion of defendant's expert that the zoning ordinance was reasonable, Call agreed that the reasonableness of defendant's zoning ordinance was debatable. In light of the case law regarding plaintiffs' constitutional claims, the trial court correctly ruled plaintiffs failed to meet their burden of proof. The trial court correctly granted defendant's motion to dismiss. We agree.

The legal principles the trial court applied to plaintiffs' constitutional challenge to defendant's zoning have recently been reaffirmed by our Supreme Court, notwithstanding anything to the contrary in this Court's decision in *Scots Venture*. The Court in *Kyser v Kasson Twp*, 486 Mich 514, opined:

> Zoning constitutes a legislative function. The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1).[1] This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. Because local governments have been invested with a broad grant of power to zone, it should not be artificially limited. Recognizing that zoning is a legislative function, this Court has repeatedly stated that it does not sit as a superzoning commission. Instead, the people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. We reaffirm these propositions.

1. MCL 125.3201(1) provides:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.

> However, the local power to zone is not absolute. When the government exercises its police power in a way that affects individual constitutional rights, a citizen is entitled to due process of law. . . . The test to determine whether legislation enacted pursuant to the police power comports with due process is

> whether the legislation bears a reasonable relation to a permissible legislative objective. The level of the governmental interest that is sufficient depends on the nature of the affected private interest. When the individual interest concerns restrictions on the use of property through a zoning ordinance, the question is whether the power, as exercised, involves an undue invasion of private constitutional rights without a reasonable justification in relation to the public welfare. A zoning ordinance is presumed to be reasonable. Starting with such a presumption, the burden is upon the person challenging such an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance. Stated another way, the challenger must demonstrate that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property. Under this standard, a zoning ordinance will be struck down only if it constitutes an arbitrary fiat, a whimsical *ipse dixit*, and . . . there is no room for a legitimate difference of opinion concerning its [un]reasonableness. [*Kyser*, 486 Mich 520-522; Citations and quotation marks omitted.]

Under this standard, the trial court did not err in finding that plaintiffs' evidence regarding defendant's zoning ordinance fell far short of overcoming the presumption of validity. As applied to plaintiffs' property, defendant's zoning ordinance is rationally related to advancing numerous legitimate governmental interests. These include preventing overcrowding, preserving farmland and the rural character of the area—even if those primarily relate to aesthetics—and ensuring that adequate infrastructure and public services are available to support any increase in population. Plaintiffs' evidence and arguments relate to the wisdom of the zoning, i.e., that farming is not the best use for the property and that denser residential use would not only be more profitable but also would serve a growing nearby urban community. But the wisdom of defendant's zoning choices does not affect the constitutionality of the ordinance, as reiterated in *Kyser*, 486 Mich 522 n 2, quoting *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001):

> "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id*. at 259-260. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. *Thoman v Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946).

The only authority that supports plaintiffs' theory of the case is *Scots Ventures*, 212 Mich App 530. In examining the holding of that case, a panel of this Court in *Conlin*, 262 Mich App 379, politely observed that the majority in *Scots Ventures* strayed from the constitutional principles established by our Supreme Court, opining:

> It appears that the Court in *Scots* invalidated the minimum lot size requirement because "it resulted in some inequity" and because the facts alleged in support were "debatable." See [*Scots Ventures*, 212 Mich App] at 533-535. In a dissenting opinion, Judge Griffin opined that the majority merely substituted its judgment regarding the reasonableness of the township's goals, and the means chosen to achieve them. *Id.* at 535-536. We do not believe that the decision would survive the rational basis test as set out by the Supreme Court in *Muskegon Rental*[,465 Mich 456]. [*Conlin*, 262 Mich App at 392-393.]

The rational basis test applied in a substantive due process claim, not involving heighted scrutiny applicable to a suspect classification, as stated in *Muskegon Rental*, was derived from *Crego*, 463 Mich at 259, and *TIG Ins Co*, 464 Mich at 557-558. These are the same authorities on which the trial court relied, and the *Kyser* Court reaffirmed. Although we respectfully agree with the *Conlin* panel's analysis of the *Scots Ventures* decision, it is sufficient to note that *Scots Ventures* is factually distinguished from the present case.

First, as the trial court observed, the property at issue here had been used as farmland in the past whereas the property in *Scotts Ventures* had not; it had been used for recreational purposes. Second, in *Scots Ventures*, 212 Mich App at 533, the Court found that the defendant's zoning restrictions were not reasonably related to the legitimate governmental interests of "preservation of farmland and the area's rural character." In contrast, here, plaintiffs' expert agreed that defendant's zoning scheme is a reasonable way to avoid overcrowding and infrastructure problems. Additionally, in *Scotts Ventures*, the plaintiff sought to develop 5-acre residential sites in a district requiring 10-acre minimum lot sizes. In contrast, plaintiffs here desired to drastically increase the potential residential density 20-fold in the larger 110-acre parcel and by 200 percent in the smaller 56-acre parcel. Moreover, the majority in *Scots Ventures*, 212 Mich App at 533, recognized that "preservation of farmland and the area's rural character" are legitimate governmental interests, and the evidence here supported the trial court's finding that defendant's zoning restrictions reasonably advanced those interests. Consequently, the trial court did not err in dismissing plaintiffs' constitutional claims.

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens